P.L. CONSTRUCTION SDN. BHD.

v.

ABDULLAH SAID

HIGH COURT MALAYA, JOHOR BAHRU
ZAKARIA YATIM J
[CIVIL SUIT NO. 23-1339 OF 1986]
17 MARCH 1988

CIVIL PROCEDURE: *Judgment in default of defence - Application to set aside judgment in default - Whether affidavit required to state 48 hours notice had been complied with - Rule 56 of the Legal Profession [Practice and Etiquette] Rules 1978 - Affidavit of Merits - Whether annexing proposed defence and Counterclaim to Affidavit sufficient to show merits.*

By an oral Agreement the plaintiff agreed to undertake the construction of Sekolah Agama, Air Molek, Johore Bahru from the defendant. The plaintiff averred that the defendant had failed to pay them the sum of RM176,595.15 being progressive payments despite demands being made. The contract terminated and the plaintiff filed their writ on 8 October 1986 and the defendant filed his appearance on 15 December 1986. As no defence was filed on 19 February 1987 the plaintiff obtained judgment in default of defence against the plaintiff.

The defendant filed an application to set aside the judgment in default of defence on 24 May 1987. The Senior Assistant Registrar allowed the application with costs on the ground that the plaintiff had failed to file an affidavit stating that the 48 hours notice had been given to the defendant before judgment in default of defence was filed. The plaintiffs appealed against this decision.

Held:

[1] The 48 hours notice rule is only a rule of practice and there is no need to file an affidavit in stating that the rule had been complied with. Non compliance with the rule does nor render the judgment in default irregular.

[2] That the judgment being a regular judgment the defendant has to show a defence on the merits and that on the proposed defence and counterclaim exhibited in the affidavit in support of the application to set aside there is a defence on the merits or at least an issue which should go for trial.

[Appeal dismissed.]

Cases referred to:

Asia Commercial Finance (M) Berhad v. Bank Bumiputra Malaysia Berhad & Ors. [1988] 1 MLJ 33
Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon & 5 Ors. [1985] 1 CLJ (Rep) 575
Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd. [1985] CLJ (Rep) 760
Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukano Jam City Port & Ors. [1989] 1 CLJ (Rep) 537
Evans v. Bartlam [1937] AC 473
Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23
B. Dialdas & Co. (Pte.) Ltd. v. Sin Sin & Co. & Ors [1983] CLJ (Rep) 475

JUDGMENT

Zakaria Yatim J:

This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar given on 25 October 1987 ordering that judgment in default of defence entered against the defendant on 27 January 1987 be set aside. The plaintiff is a registered company incorporated in Malaysia and has its place of business at No. 27, Jalan Ungu 7, Taman Pelangi, Johor Bahru. The defendant is a main contractor undertaking the construction of Sekolah Agama, Air Molek, Johor Bahru from the SEDC, Johor. By an oral agreement made between the plaintiff and the defendant in July 1985, the plaintiff agreed to undertake the construction of the said school from the defendant. It was agreed that the defendant would pay the plaintiff for the progressive work carried out by the plaintiff as and when the defendant was requested to pay by the plaintiff. In the statement of claim the plaintiff averred that they commenced work on 3 September 1985, but in breach of the said oral contract the defendant refused, neglected and/or wrongfully refused to pay the sum of RM176,595.12 being progressive work done and material supplied on the site. The plaintiff, had by a letter dated 13 August 1986 formally demanded for the said payment of RM176,595.12 but the defendant failed to pay the said sum or part of it. The contract between the parties was then mutually terminated.

The plaintiff filed their writ on 8 October 1986 and served it on the defendant on 26 November 1986. The defendant filed his appearance on 15 December 1986. No defence was filed after appearance was entered and on 19 February 1987 the plaintiff obtained judgment in default of defence against the defendant.

On 24 May 1987 the defendant filed an application to set aside the judgment in default of defence. The application was heard by the Senior Assistant Registrar who granted the application with costs.

Before the plaintiff entered judgment in default of defence, the forty-eight hour notice under r. 56 of the Legal Profession (Practice and Etiquette) Rules 1978, was sent to the defendant by letter dated January, 1987. The defendant contended that the judgment in default of defence was an irregular judgment because the plaintiff did not file an affidavit to say that the forty-eight hour rule had been complied with. The Senior Assistant Registrar accordingly set aside the judgment in default on this ground.

In my opinion the forty-eight hour notice is only a practice rule as embodied in r. 56 of the Etiquette Rules 1978. In the present case the plaintiff had complied with the rule. There is no need to file an affidavit to say that the rule had been complied with. In fact even non-compliance with the rule does not render the judgment in default irregular. The judgment would only be an irregular judgment if the plaintiff failed to comply with any of the Rules of the High Court 1980. In *Asia Commercial Finance (M) Berhad v. Bank Bumiputra Malaysia Berhad & Ors.* [1988] 1 MLJ 33, I stated in my judgment at p. 34:

> In my opinion, the Practice and Etiquette Rules 1978 only regulate the professional practice, etiquette, conduct and discipline of an advocate and solicitor. The Rules do not regulate the procedure of legal proceedings in the High Court ... It is clear, therefore, that non-compliance with r. 56 ... does not render the judgment in default of defence ... irregular. Under O. 2 r. 1 of the Rules of the High Court shall be treated as an irregularity. In other words judgment in default of defence is only an irregular judgment if the plaintiff, in obtaining the judgment, failed to comply with the rules of the High Court.

In view of the passage quoted above, it is clear that the judgment in default of defence entered against the defendant in the present case is a regular judgment.

Since it is a regular judgment the next question for the Court to consider is whether there is an affidavit of merits.

Curiously enough, there are two similar applications by the same defendant to set aside the same judgment in default. The first application was filed on 14 May 1987 and the application was supported by the affidavit of the defendant and the affidavit of the defendant's solicitor, Mohamad bin Ibrahim. The second application was filed on 24 May 1987 and that application was supported by the affidavit of the defendant's solicitor, Mohamad bin Ibrahim. From the record, it appears that the Senior Assistant Registrar's decision was based on the second application. Since there are two applications and there are three affidavits in support of the two applications, it may be useful to examine whether all three affidavits disclose any defence on the merits. The affidavit of Abdullah bin Said merely states that he had a good defence in this matter and that he had a counterclaim against the plaintiff. It does not, however give any particulars of his defence or his counterclaim. The affidavit of Mohamad bin Ibrahim does not mention any defence on the merits at all. In his affidavit in support of the second application, he states however that he "verily believes that the defendant has a good defence in this matter and a counter-claim against the plaintiff." The deponent does not give particulars of the defence and counterclaim in the affidavit. However, he exhibited a draft statement of defence and counterclaim to the same affidavit.

Counsel for the plaintiff/appellant, Miss Tay Siew Fong submitted that Encik Ibrahim's affidavit could not be used to support the application because a solicitor would not have personal knowledge of the facts of the case. According to her, the proper person to file the affidavit was the defendant himself. Accordingly, she said there was no evidence in support of the defence on the merits. In support of her submission she cited *Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon & 5 Ors.* [1985] CLJ (Rep) 575 and *Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd.* [1985] CLJ (Rep) 760. I agree that solicitors should be discouraged from filing contentious affidavits or affidavits where there are disputed questions of fact. However, the Rules of the High court 1980 do not for example, prohibit a solicitor from filing an affidavit in support of an O. 14 application provided that the requirements contained therein are complied with. See *Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukano Jam City Port & Ors.* [1989] 1 CLJ (Rep) 537. Although the present case deals with the question of setting aside judgment in default of defence, in my opinion Encik Ibrahim's affidavit in support of the second application in so far as the draft defence and counterclaim exhibited to it is concerned, is relevant and admissible.

Under O. 13 r. 8, the Court is given wide discretion to set aside or vary any judgment entered in default of appearance or in default of defence. In *Evans v. Bartlam* [1937] AC 473, Lord Atkin in his judgment at p. 480 said "... that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence. ..." In *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 Raja Azlan Shah Ag CJ (Malaya), as he then was said "It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits, ..." The term "defence on the merits" means a defence which discloses an arguable and triable issue. *B. Dialdas & Co.(Pte.) Ltd. v. Sin Sin & Co. & Ors* [1983] CLJ (Rep) 475.

The question for the Court to consider now is whether the draft statement of defence exhibited to Encik Ibrahim's affidavit discloses a defence on the merits or an arguable or triable issue.

In the second paragraph of the draft statement of defence, the defendant denies that he is required to pay the plaintiff as and when required but avers that the plaintiff is entitled to claim a sum equivalent to the value of the works done by the plaintiff less six percent as agreed between the parties, and this is to be ascertained by the SEDC Johor. In para. 4, the defendant avers that the plaintiff intimated to him sometime in April 1986 that the plaintiff wished to terminate the contract as the plaintiff was not in a position to carry on with the work. In para. 5 the defendants avers that the employer (Perbadanan Kemajuan Ekonomi Negeri Johore) paid the defendant on 5 June 1986 a sum of RM151,300. In paras. 6 and 7, the defendant states that he had made payments to third parties and after having made such payments, the plaintiff is entitled to a payment of RM54,476.55. The defendant, however avers that he is entitled to set-off the said sum for losses suffered by him as a result of delay caused by the plaintiff. In his counterclaim, the defendant alleges that the plaintiff failed and/or neglected to execute the works in accordance with the time schedule stipulated by the employer in the Tender Agreement which the defendant intends to refer at the trial. The defendant further states that the plaintiff through their neglect and/or refusal caused a delay of 90 days whereby the defendant was penalised by the employer for a sum RM300 a day causing a total loss of RM27,000. In view of the delay the defendant claims from the plaintiff a sum of RM500 a day being loss suffered by the defendant and the total amount claimed is RM45,000. The defendant accordingly claims from the plaintiff a sum of RM72,000 in the counterclaim.

In my opinion, from the draft statement of defence, there is a defence on the merits or at least there is an arguable case or an issue which should go for trial.

For the reasons stated above, I dismiss the plaintiff's appeal. The defendant will file his defence within three weeks from the date of this judgment. The defendant will pay the cost of this appeal and the cost of the application before the Registrar to the plaintiff.

Plaintiffs appeal dismissed. The defendants to pay the costs of the appeal and the cost of the application before the Registrar to the plaintiff.

Also found at [1988] 2 CLJ 808